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State Sponsorship and Support of International Terrorism: Customary Norms of State Responsibility

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Preamble

At its first plenary meeting of the year, on September 12, 2001, the United Nations General Assembly adopted Resolution 56/1 without a vote:

> The General Assembly, [g]uided by the purposes and principles of the Charter of the United Nations... urgently calls for international cooperation to prevent and eradicate acts of terrorism, and stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of such acts will be held accountable.[1]

Introduction

The horrors of September 11, 2001 and the events that unfolded that tragic day do not need to be recounted here. It was a terrible day in history, especially painful for Americans and those who lost their loved ones. Indeed, the terrorist attacks were an assault on human rights and the entire world order. The clandestine al Qaeda terrorist network, established and led by the notorious Osama bin Laden, perhaps represents the most pernicious and underestimated threat to international peace and security in the post-Cold War world. International terrorism manages to survive and even flourish, threatening to topple governments, destroy economies, and shatter

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1. G.A. Res. 56/1, U.N. GAOR, 56th Sess., Supp. No. 49, at 4, U.N. Doc. A/56/49 (2001) [hereinafter Resolution 56/1].

people's sense of security, all while working underground and out of sight, apparently in private and alone.

But for all its secrecy, terrorists work within national borders and often in cooperation with public officials or with the acquiescence of political leaders. The September 11 attacks by al Qaeda are a grave reminder that sometimes terrorists depend on public officials, such as the Taliban regime, for freedom to work and protection from prosecution. Although many international terrorists act alone without state support and in defiance of authorities, state sponsorship and support of terrorism is a reality. States encourage, organize, tolerate, finance, and train private sub-national groups to commit terrorist acts, and when the horror is done, states honor the perpetrators and welcome them into their land.[2]

This note explores the symbiotic relationship between states and private persons who commit crimes of international terrorism, and analyzes the relevant customary norms of international law that may serve as a legal device to hold states accountable in damages for state sponsorship and support of international terrorism.[3] Part I of this note examines the historical development of customary and conventional norms relating to international terrorism and its definition. Part II describes the duties that states owe to each other in preventing and punishing international terrorism under the law of state responsibility for injuries to aliens. Various types of state misconduct that give rise to state responsibility for terrorist activities committed by private persons are discussed within a framework that distinguishes between state sponsorship and support of terrorism.

Although legal remedies to acts of terrorism are not always satisfactory, the potential value and positive externalities of recourse to international law should not be disregarded.[4] The international

2. *See* Kerry Ann Gurovitsch, *Legal Obstacles to Combating International State-Sponsored Terrorism*, 10 HOUS. J. INT'L L. 159, 159 (1987); Brian M. Jenkins, *International Terrorism: A New Mode of Conflict*, *in* INTERNATIONAL TERRORISM AND WORLD SECURITY 13, at 26-27 (David Carlton & Carlo Schaerf eds., 1975).

3. There are primarily two methods for an injured state to bring a claim against another state under the current international legal order. Most disputes are settled within the political system through an exchange of diplomatic notes. Sometimes, however, a state may bring a lawsuit before a tribunal empowered to adjudicate the rights and obligations of the relevant state parties. Jurisdiction normally is based on the consent of the parties.

4. The very notion of international law in a world dominated by sovereign equals is problematic because there is no authoritative rule maker, rule enforcer, or rule interpreter. This problem of authority, however, is not necessarily fatal to

legal system is a peaceful, legitimate, and law-producing method to hold states accountable for terrorist activities and compensate states for injuries. It is also one effective way to build consensus among states about the illegitimacy of terrorism and state responsibility for the prevention and punishment of terrorism.

I. The Criminality of Terrorism under International Law

"Our war on terror begins with al Qaeda, but it does not end there," President Bush pledged on September 20, 2001. "It will not end until every terrorist group of global reach has been found, stopped and defeated."[5]

The United Nations Security Council agreed with President Bush on the urgent need to fight terrorism and cooperate in that endeavor to successfully purge the world of international terrorists.[6] The General Assembly, Security Council, and every major regional organization, including the Arab League, agreed the September 11 hijackings and attacks on the World Trade Center and Pentagon were acts of terrorism in violation of international law.[7]

Other than al Qaeda, however, it is unclear exactly who the common enemy is in the war on terror. There are dozens of terrorist organizations worldwide operating on international, regional, and national scales.[8] Most of these organizations are dealt with on a state

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international law. Even in domestic legal systems with an authority structure, the law derives much of its force from its constituency, which may or may not regard the law as legitimate and obligatory. International law then, which is based on state consent, is a sociological enterprise, in which the law is found in those conventional and customary practices of states regarded as legitimate and binding rules of conduct. Indeed, the three primary sources of international law are treaties and conventions, customary norms accepted as law, and general principles of law common to most domestic legal systems. Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055, T.S. No. 993.

5. President Bush, Address to Joint Session of Congress (Sept. 20, 2001), *in* U.S. NEWSWIRE, Sept. 20, 2001, *available at* 2001 WL 21898403.

6. U.N. SCOR, 56th Sess., 4385th mtg. at 2, U.N. Doc. S/RES.1373 (2001).

7. The U.N. General Assembly condemned the attacks as illegal and criminal acts of terrorism. Resolution 56/1, *supra* note 1. The Security Council condemned the attacks "as a threat to international peace and security." U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES.1368 (2001). The Northern Atlantic Treaty Organization, European Union, Organization of American States, Association of South East Asian Nations, Organization of African Unity, and Arab League also agreed that the hijacking of American passenger airliners by al Qaeda terrorists was criminal. Colin Powell, *A Long, Hard Campaign*, NEWSWEEK, Oct. 15, 2001, at 53.

8. *See* Neil King Jr. & Jim Vandehei, *Defining 'Global Reach' May Prove Elusive*, WALL ST. J. EUR., Sept. 27, 2001, *available at* 2001 WL-WSJE 21838298.

basis and the Bush Administration's strategy to focus on terrorist groups of global reach is a recognition that it cannot go after every alleged terrorist. But although government resources are scarce and the best allocation of resources is a delicate policy judgment, it is quite a different matter for states to disagree over what criminal acts qualify as terrorism and which persons, groups, or states are regarded as perpetrators of terrorism.

The word "terrorism" was first coined in connection with the Jacobin "Reign of Terror," a period of the bloody French Revolution in which the French state, under the control of Robespierre, executed approximately 17,000 presumed enemies of the state.[9] After World War I, the League of Nations drafted the first penal instrument making terrorism an international offense, entitled the Convention for the Prevention and Punishment of Terrorism.[10] This Convention, which adopted a very broad definition of terrorism, never entered into force because only one state, India, ratified the agreement.[11] Nevertheless, certain customary norms of international law relating to the use of armed force, most notably the duty of states "to prevent and suppress such subversive activity against foreign Governments as assumes the form of armed hostile expeditions or attempts to commit common crimes against life or property,"[12] implicitly proscribed at least certain instances of terrorism.

After the Second World War, the international community codified certain binding norms of international law in the United Nations Charter. The architects of the United Nations, who were intimately acquainted with the causes of armed conflict and the consequences of war, declared that the purpose of the United Nations was:

> [t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and

9. John F. Murphy, *Defining International Terrorism: A Way Out of the Quagmire*, 19 ISRAEL Y.B. HUM. RTS. 13, 14 (1989).

10. 19 LEAGUE OF NATIONS O.J. 23 (1938).

11. The Convention defines terrorism as "criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public." *Id.*

12. 1 LASSA OPPENHEIM, INTERNATIONAL LAW 292-293 (Hersch Lauterpacht ed., 8th ed. 1955).

> international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace . . . .[13]

Although the Charter does not expressly mention terrorism, Article II, section 4 seems to prohibit state support of international terrorism. It orders all Member States to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[14] In 1970, the General Assembly approved the Declaration on Principles of International Law concerning Friendly Relations and Co-Operation Among States, which made the Charter's implied prohibition on state support of international terrorism express:

> Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force .... Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.[15]

Unlike Article II, section 4, which only requires that states refrain from the threat or use of force, the Declaration Concerning Friendly Relations requires positive action on the part of the state so as not to acquiesce in or tolerate terrorist activities originating from within its territory. Unfortunately, it is not clear what legal status the Declaration possesses under international law. A special committee drafted the Declaration to be a restatement of seven fundamental principles of international law and the General Assembly adopted it by consensus.[16] While resolutions passed by the General Assembly are not binding on state parties, they are soft evidence of the *opinio juris* of states, especially when passed with near unanimity and repeatedly over time.

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13. U.N. CHARTER art. 1, para. 1.

14. *Id.* art. 2, para. 4.

15. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 123, U.N. Doc. A/8028 (1970).

16. Richard B. Lillich & John M. Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AM. U. L. REV. 217, 270-271 (1977).

Although passed only once, some commentators regard the Declaration Concerning Friendly Relations as an authoritative interpretation of the U.N. Charter because of the drafting committee's mandate to restate the fundamental principles of international law.[17] Furthermore, there is a long-standing General Assembly practice of passing resolutions that condemn both active and passive state support of terrorism[18] and in recent years, the Security Council stated that "all States shall [r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts . . . ."[19] Professor Lillich, a widely respected publicist on international terrorism and state responsibility,[20] agrees that customary international law expects states to prevent their territory from being used by terrorists for the preparation or commission of acts of terrorism against aliens within its territory or against the territory of another state.[21] Indeed, it is rarely asserted that state acquiescence in or toleration of acts of international terrorism is lawful; states are more inclined to deny that the state's action or inaction rises to the level of state support or that the alleged act of terror meets the legal definition of terrorism.

In fact, a single definition of terrorism is not found in either customary or conventional international law. For the past thirty years, efforts by the United Nations to draft a single broad definition of terrorism acceptable to all states, such as that found in the Convention for the Prevention and Punishment of Terrorism, have

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17. *Id.* at 271-272.

18. *See, e.g.*, G.A. Res. 31-102, U.N. GAOR, 31st Sess., Supp. No. 39, at 185-186, U.N. Doc. A/31/39 (1976); G.A. Res. 34-145, U.N. GAOR, 34th Sess., Supp. No. 46, at 244-245, U.N. Doc. A/34/46 (1980); G.A. Res. 38-130, U.N. GAOR, 38th Sess., Supp. No. 47, at 266-267, U.N. Doc. A/38/47 (1983); G.A. Res. 44-29, U.N. GAOR, 44th Sess., Supp. No. 49, at 301-303, U.N. Doc. A/44/49 (1989); G.A. Res. 46-51, U.N. GAOR, 46th Sess., Supp. No. 49, at 283-285, U.N. Doc. A/46/49 (1991); G.A. Res. 51-210, U.N. GAOR, 51st Sess., Supp. No. 49, at 346-348, U.N. Doc. A/51/49 (1996); G.A. Res. 53-108, U.N. GAOR, 53rd Sess., Supp. No. 49, at 364-365, U.N. Doc. A/53/49 (1998); G.A. Res. 56-160, U.N. GAOR, 56th Sess., Supp. No. 49, at 358-359, U.N. Doc. A/56/49 (2001) [hereinafter General Assembly Resolutions].

19. U.N. SCOR, 56th Sess., 4385th mtg. at 2, U.N. Doc. S/RES.1373 (2001); *see also* U.N. SCOR, 56th Sess., 4413th mtg. at 157-158, U.N. Doc. S/RES.1377 (2001); U.N. SCOR, 54th Sess., 4053rd mtg. at 157-158, U.N. Doc. S/RES.1269 (1999).

20. The writings of widely respected publicists, so long as they reflect the actual status of the law rather than personal recommendations, are a subsidiary source of international law. Statute of the International Court of Justice, *supra* note 4, at 1060.

21. *See* 1 LASSA OPPENHEIM, INTERNATIONAL LAW § 127a (Robert Jennings & Arthur Watts eds., 9th ed. 1996); Lillich, *supra* note 16, at 245, 261.

failed.[22] Conventional international law on terrorism is presently limited to a relatively small number of widely accepted conventions that proscribe particular types of terrorism, which likely reflect customary norms of international law.[23] The most common types of terrorism covered by these conventions include crimes against the safety of civil aviation and maritime navigation, the taking of hostages, the use of nuclear and chemical weapons, and crimes against internationally protected persons.[24]

Terrorism, however, is not limited to these conventional situations; and is more generally understood as involving the deliberate use of violence against civilians with the intent to induce a common or general danger, usually for political ends.[25] Although this definition of terrorism does not appear in any binding international instruments, it provides a useful starting point for a discussion of terrorism under customary international law. This definition does not, however, regard attacks on non-civilians, such as the 2000 al Qaeda attack on the U.S.S. Cole that killed seventeen Navy personnel, as terrorist in nature. Instead, an attack on the military of a state is judged according to international norms concerned with the use of armed force. Although civilians are certainly the prototypical targets of terrorism, the U.S. State Department also regards attacks on non-combatants as terrorism.[26] Under this broader definition, the 2000 attack on the U.S.S. Cole is terrorism because the ship was peacefully stationed off the coast of Yemen.

In any case, terrorism, as its name implies, is intended to intimidate, frighten, or incite panic in the public.[27] Unlike other criminals, terrorists regard possible victims of an attack as fungible so

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22. Rosalyn Higgins, *The General International Law of Terrorism, in* TERRORISM AND INTERNATIONAL LAW 14 (Rosayln Higgins & Maurice Flory eds., 1997); *see also* Murphy, *supra* note 9, at 15-18.

23. *See* Louis Rene Beres, *On International Law and Nuclear Terrorism*, 24 GA. J. INT'L & COMP. L. 1, 1-2 (1994).

24. *See* Yonah Alexander, *Terrorism in the Twenty-First Century: Threats and Responses*, 12 DEPAUL BUS. L.J. 59, 92-94 (1999).

25. Murphy, *supra* note 9, at 14.

26. *See* 22 U.S.C.A. § 2656f(d)(2) (2002).

27. Defining the relevant population for purposes of determining whether an act of violence was tailored to terrorize the public is itself problematic. "The size of the group affected will differ depending on the purpose and possibilities of the perpetrators: from a whole nation . . . to a restricted group such as the passengers using a means of transportation that has become the object of unlawful seizure." Krzysztof Skubiszewski, *Definition of Terrorism*, 19 ISRAEL Y.B. HUM. RTS. 39, 42 (1989).

long as they are representative or symbolic of the larger public. Thus, terrorists target diplomats, Olympic athletes, public transportation systems, and other symbols of nations and governments. International terrorism, and the fear that it engenders, is used as a political and social tool to punish, gain concessions and publicity for a cause, and to provoke disorder and retaliation.[28]

Even this definition of terrorism, however, is not complete. Under customary international law, defining the perpetrators of terrorism is problematic and controversial. As a factual matter, private persons, organizations, and states are perpetrators of terrorist-like activities, but the international community often draws legal distinctions about the legitimacy of such activities based on the identity of the actor. These distinctions lie at the very heart of the war on terror and threaten to divide the international community.

Under customary international law, states are not perpetrators of terrorism because terrorism is a penal offense and states are not subjects of international criminal law.[29] Nonetheless, General Assembly resolutions that repeatedly condemn state undertaking and support of terrorism implicitly acknowledge that states are involved in terrorist activities.[30] Authoritarian, totalitarian, and racist regimes use terrorism as an instrument of power and domination over their own people. Both non-democratic and democratic states engage in terrorist-like military operations against foreign civilian populations, such as the atomic bombing of Hiroshima and Nagasaki, and other states sponsor and support extremist terrorist organizations fighting foreign occupation.

Some scholars argue states should be subjects of international criminal law.[31] An international criminal court would enable any state to charge another state for "certain flagrant harms" regarded as an injury to "the entire international community," whereas the current legal system based on the law of state responsibility limits standing to the state injured in fact.[32] Of course, states cannot be criminally

28. Jenkins, *supra* note 2, at 16-19.

29. Although states themselves are incapable of being held criminally liable for acts of terrorism under the current international system, natural persons may be prosecuted for their actions and their status as a public official or other agent of the state does not relieve them of criminal responsibility. Skubiszewski, *supra* note 27, at 45.

30. *See* General Assembly Resolutions, *supra* note 18.

31. *See* OPPENHEIM, *supra* note 12, at 396.

32. Edward M. Wise, *International Crimes and Domestic Criminal Law*, 38

prosecuted and punished in the same manner as natural persons or corporate entities. There is no judiciary with criminal jurisdiction over states[33] and the punishment of states, unlike other legal creations such as corporations, which are subject to dissolution, is necessarily limited to the imposition of monetary penalties. Moreover, it may be undesirable to impose criminal penalties on states because those harmed most are likely to be working people with little or no connection to the state's misconduct.[34] Nevertheless, criminal penalties for states may operate as a more effective deterrent than the current legal system, which does not authorize punitive damages against states for their participation in terrorist activities.

Under the law of state responsibility for injuries to aliens, states are liable in delictual damages for any terrorist act attributable to the state.[35] The underlying cause of action is premised on the responsible state's violation of the law of armed conflict, which imposes limitations on the use of force or threats by states against foreign civilian populations, or laws relating to the protection of human rights, which establish minimum standards for the treatment of people.[36] Although injured states are compensated for their harm under this system, unlike natural persons and non-state entities, states are free from criminal punishment for their participation in terrorist activities.

Whereas some scholars argue states should be subject to the same criminal laws as persons, others argue that both states and persons should have more, rather than less, freedom to engage in terrorist activities when the cause for violence is just.[37] They argue that terrorism is sometimes the best available vehicle to achieve change in a static domestic and international system in which governments do not represent the ethnic and religious composition of their people.

In 1972, the United States attempted to push through the Draft Convention for the Prevention and Punishment of Certain Acts of

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DEPAUL L. REV. 923, 929-930 (1989).

33. *Id.*

34. *See id.*

35. Skubiszewski, *supra* note 27, at 47.

36. *Id.* at 45; Higgins, *supra* note 22, at 15-16.

37. Thomas M. Franck & Scott C. Senecal, *Porfiry's Proposition: Legitimacy and Terrorism*, 20 VAND. J. TRANSNAT'L L. 195, 222 (1987); Wil D. Verwey, *The International Tehran Convention and National Liberation Movements*, 75 AM. J. INT'L L. 69, 74 (1981).

International Terrorism, after the kidnapping and murder of eleven Israeli athletes at the Munich Olympic Games.[38] This Convention, which focused on the prevention and prosecution of acts of terrorism committed by private persons, did not confront state support of terrorism or even define terrorism.[39] Nonetheless, support for the Convention collapsed under the charge by Arab states that it was targeted against all national liberation movements.[40] In the general debate, a Libyan representative described the Convention as a "'ploy . . . against the legitimate struggle of the people under the yoke of colonialism and alien domination' and warned against the United Nations becoming 'an instrument in local election campaigns and a pawn of international propaganda based on falsehood and deceit.'"[41] The U.S. Representative, while conceding that the causes of terrorism should be studied, replied: "'[w]e do not hesitate in our domestic law to prohibit murder even though we have not eliminated all sources of injustice or identified all the causes which lead men to commit violent acts.'"[42]

After the failure of the U.S. initiative, a resolution submitted by Algeria condemning "terrorist acts by colonial, racist and alien regimes" and upholding the legitimacy of the struggles of peoples against such regimes, passed the General Assembly by a vote of 76 to 35, with 17 abstentions.[43] The General Assembly, far from settling the conflict, continues to speak with multiple voices up to the present day, both condemning "the acts, methods and practices of terrorism in all its forms and manifestations"[44] and upholding "the right to self-determination of peoples under colonial domination and foreign occupation . . . ."[45] This unresolved tension is also present in the

38. John F. Murphy, *United Nations Proposals on the Control and Repression of Terrorism*, *in* INTERNATIONAL TERRORISM AND POLITICAL CRIMES 493, 496 (M. Cherif Bassiouni ed., 1975).

39. *Id.*

40. *Id.* at 502.

41. *Id.* at 499.

42. *Id.* at 499-500.

43. G.A. Res. 3034, U.N. GAOR, 27th Sess., Supp. No. 30, at 119, U.N. Doc. A/8730 (1972).

44. G.A. Res. 56-160, *supra* note 18, at 359.

45. G.A. Res. 56-141, U.N. GAOR, 56th Sess., Supp. No. 49, at 326, U.N. Doc. A/56/49 (2001); *see also* G.A. Res. 2787, U.N. GAOR, 26th Sess., Supp. No. 29, at 82-83, U.N. Doc. A/8429 (1971); G.A. Res. 31-34, U.N. GAOR, 31st Sess., Supp. No. 39, at 93-94, U.N. Doc. A/31/39 (1976); G.A. Res. 35-35, U.N. GAOR, 35th Sess., Supp. No. 48, at 175-177, U.N. Doc. A/35/48 (1980); G.A. Res. 38-17, U.N. GAOR, 38th Sess., Supp. No. 47, at 185-187, U.N. Doc. A/38/47 (1983); G.A. Res. 44-80, U.N.

Declaration Concerning Friendly Relations, which simultaneously proscribes terrorism and upholds the right of peoples to self-determination.[46]

As a practical matter, deadlock between states regarding the use of terrorism by national liberation movements may trigger the application of the default rule of international law, which permits everything in the absence of an express prohibition.[47] Acts of terror not falling into conventional international law fall into a lacuna in the law, and consequently, their illegitimacy is uncertain. It would seem that some terrorist acts, such as the destruction of the twin towers of the World Trade Center, supposing it had not been accomplished through the use of hijacked planes, which is itself specifically proscribed by convention, run afoul of the U.N. Charter's prohibition on armed attacks, whereas Palestinian suicide bombings are arguably justified under the principle of self-determination.

The attacks of September 11, however, which are unprecedented in the annals of terrorism, demonstrated the unpredictable and limitless potential of terrorism to cause devastating injury and mobilized major players in the international arena to an unequivocal condemnation of terrorism. In his October 1 opening speech to the General Assembly, Secretary-General Kofi Annan stated:

> I understand and accept the need for legal precision. But let me say frankly that there is also a need for moral clarity. There can be no acceptance of those who would seek to justify the deliberate taking of innocent civilian life, regardless of cause or grievance. If there is one universal principle that all people can agree on, surely it is this.[48]

GAOR, 44th Sess., Supp. No. 49, at 203-204, U.N. Doc. A/44/49 (1989); G.A. Res. 46-88, U.N. GAOR, 46th Sess., Supp. No. 49, at 157-158, U.N. Doc. A/46/49 (1991); G.A. Res. 51-84, U.N. GAOR, 51st Sess., Supp. No. 49, at 226-227, U.N. Doc. A/51/49 (1996); G.A. Res. 54-155, U.N. GAOR, 54th Sess., Supp. No. 49, at 287-288, U.N. Doc. A/54/49 (1999); G.A. Res. 55-85, U.N. GAOR, 55th Sess., Supp. No. 49, at 364, U.N. Doc. A/55/49 (2000).

46. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1970). In fact, the Syrian delegate to U.N. proceedings on the Declaration concerning Friendly Relations expressed his state's belief that the Declaration's proscription on state support of terrorism does not apply to "Palestinian terrorist raids into Israel supported by Arab states." Lillich, *supra* note 16, at 272.

47. The Case of the S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. E) No. 4, at 166, 174-175 (Sept. 7).

48. *See* Michael J. Jordan, *Terrorism's Slippery Definition Eludes UN Diplomats*, *in* THE CHRISTIAN SCI. MONITOR, Feb. 4, 2002, *available at* 2002 WL 6423921.

Although the Secretary-General's speech falls far short of offering an operational definition of terrorism capable of distinguishing simple acts of violence from terrorism, his condemnation of terrorist acts "regardless of cause or grievance" was a ceremonially important event. It suggested that a just cause, such as a national liberation movement, does not excuse the use of terrorist means.[49]

Six weeks later, on November 12, 2001, the Security Council endorsed the Secretary-General's position and said for the first time that the "acts, methods and practices of terrorism [are] criminal and unjustifiable, regardless of their motivation ...."[50] The Security Council, however, did not refer specifically to national liberation movements or define terrorism, which would have removed much doubt as to its intentions, and also has not condemned Palestinian suicide attacks on Israeli civilians.[51] Moreover, similar language is employed in General Assembly resolutions that purport to condemn terrorism unequivocally, and yet, those resolutions are counterbalanced by other resolutions reaffirming the right to self-determination.

At this time, it is difficult to foresee the long-term impact of September 11 on the definition of terrorism under international law. Even if there is not good cause to believe the legal system has resolved historical and cultural differences over the illegitimacy of different acts of terror, there is hope that common international interests in peace and security will play a more significant role in the foreign relations of states than in the past. Historically many states consider it in their best interest not to consent to antiterrorism conventions that necessarily limit their sovereignty, thereby

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49. For the writings of scholars who write that a just cause does not justify or change the illegal character of a terrorist attack, see Louis Rene Beres, *The Meaning of Terrorism - Jurisprudential and Definitional Clarifications*, 28 VAND. J. TRANSNAT'L L. 239, 241-242 (1995); Skubiszewski, *supra* note 27, at 52; Verwey, *supra* note 37, at 75.

50. U.N. SCOR, 56th Sess., 4413th mtg. at 2, U.N. Doc. S/RES.1377 (2001). For a discussion of whether this resolution of the Security Council carries the force of law, see *infra* Part II.B. at "State Support of Terrorism."

51. On September 24, 2002, the Security Council issued a resolution in which it condemned "all terrorist attacks against any civilians." U.N. SCOR, 57th Sess., 4614th mtg. at 1, U.N. Doc. S/RES.1435 (2002). However, while it specifically mentioned two bombings committed by Israeli authorities, the resolution did not expressly mention Palestinian suicide bombings nor did it define terrorism. *Id.*; *see also* U.N. SCOR, 57th Sess., 4503rd mtg. at 1, U.N. Doc. S/RES.1402 (2002); U.N. SCOR, 57th Sess., 4489th mtg. at 1, U.N. Doc. S/RES.1397 (2002).

constraining the government's democratic choices and making their citizens accountable to an international court.[52] In the wake of September 11, these states, most notably the United States, will likely re-evaluate their priorities and may ratify antiterrorism conventions in order to obtain and maintain international support for an on-going war on terror. International agreement on the criminality of terrorism, or at least upon the identification of the common enemy, is absolutely essential to undermining the mobility of terrorists so that they may not find refuge or support in a sympathetic state.

II. State Involvement in and Responsibility for Terrorist Activities Committed by Private Persons

The doctrine of sovereignty developed as a new theory of states during the birth of the modern state in the sixteenth and seventeenth centuries.[53] During that time, nation-states began consolidating feudalistic power and revolted against religious authority.[54] Out of the Reformation, the state emerged as the supreme and undivided authority over its people and territory.[55] Although sovereignty was first envisioned as "a principle of internal order," it transformed "into one of international anarchy."[56] When the doctrine of sovereignty was applied to the external relations of states, it became a vehicle for unrestrained and irresponsible state conduct capable of producing a perpetual state of war and conflict, in which sovereignty is absolute in theory but non-existent in fact.[57] In purporting to make all states supreme, sovereignty was used as a justification for states to engage in any activity whatsoever even if its conduct harmed another state.[58]

Over time, other customary norms or principles emerged as limitations on absolute sovereignty that promote the peaceful co-existence of states and protect the authority of the state over its

52. *See* Virginia Morris & M. Christiane Bourloyannis-Vrailas, *Current Development: The Work of the Sixth Committee at the Fifty-Third Session of the UN General Assembly*, 93 AM. J. INT'L L. 722, 728 (1999); Thalif Deen, *Politics: U.S. Shies Away from U.N. Treaties Against Terrorism*, INTER PRESS SERVICE ENG. NEWS WIRE, Sept. 12, 2001, *available at* 2001 WL 4805236.

53. J.L. BRIERLY, THE LAW OF NATIONS, ch. 1, § 2 (Humphrey Waldock ed., 6th ed. 1963).

54. *Id.* ch. 1, § 1.

55. *Id.*

56. *Id.* § 2.

57. *Id.*

58. *Id.*

domestic jurisdiction.[59] Today, the law of state responsibility for injuries to aliens, which imposes duties and responsibilities on states to prevent and compensate states for certain injuries, imposes significant limitations on state conduct. The most basic, if somewhat circular, principle of state responsibility is that a state is not absolutely liable for the actions of non-state entities, but is only responsible for conduct attributable to the state.[60] In order to hold a state liable in damages for terrorist activities committed by private persons, it is necessary for the injured state to show the conduct of the private persons is attributable to the state under customary or conventional norms of international law.

The following two sub-sections of this note, which address state sponsorship and state support of terrorism, discuss the circumstances in which the activities of private persons are attributed to the state. It is suggested that the terms "state sponsorship" and "state support" should be used to refer to two qualitatively different kinds of state involvement in terrorism. It is generally understood that state sponsorship of terrorism is limited to situations where the state planned, directed, and controlled terrorist operations and state support of terrorism includes all other lesser forms of state involvement.[61] Governments, media, and other institutions, however, often use these terms loosely as much for propagandistic purposes as to reflect a legal judgment about a state's responsibility for an act of terrorism. Several members of the Committee on Responses to State-Sponsored Terrorism, formed by the American Society of International Law in 1986, "expressed dissatisfaction with the terms 'state sponsorship' and 'state support' on the ground that these terms lack precise legal content."[62]

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59. *See id.* ch. 1, § 3. The notion that state sovereignty is actually increased through the introduction of normative restraints on state action is somewhat analogous to John Locke's construction of the social contract as a means to maximize individual liberty by surrendering certain rights found in the state of nature, such as the power to punish others for a crime, to the state. *See* MAURICE WILLIAM CRANSTON, LOCKE: A BIOGRAPHY 210 (1985).

60. *See Report of the International Law Commission on the Work of its Fifty-Third Session*, U.N. GAOR, 53d Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001) [hereinafter *ILC Report*]; CLYDE EAGLETON, RESPONSIBILITY OF STATES IN INTERNATIONAL LAW § 24 (1928); 1 LASSA OPPENHEIM, INTERNATIONAL LAW § 165 (Hersch Lauterpacht ed., 7th ed. 1948).

61. THE AMERICAN SOCIETY OF INTERNATIONAL LAW, NONVIOLENT RESPONSES TO VIOLENCE-PRONE PROBLEMS: THE CASES OF DISPUTED MARITIME CLAIMS AND STATE-SPONSORED TERRORISM 19 (1991).

62. *Id.* at 18-19.

Nonetheless, state sponsorship and state support of terrorism are solidly entrenched in the discourse of terrorism and are powerful expressions of state complicity, guilt, and participation in acts of terror. As such, these terms serve an important political and legal function, connecting states, which surreptitiously assist terrorists, to their terrible crimes. The rest of this note attempts to define the terms "state sponsorship" and "state support" in relation to well-accepted and highly developed principles of state responsibility. This approach to international terrorism should be perceived as more legitimate and predictable than the current state-based approach.

Both terms should be used to describe state involvement in terrorist acts committed by private persons.[63] However, state sponsorship is different from state support. The notion of state sponsorship is analogous to two different customary norms found in the law of state responsibility for injuries to aliens. Under the first norm, the actions of private persons are attributed to the state when the state controlled or directed the crime. The second norm attributes otherwise private conduct to the state when the state acknowledges and adopts the conduct as its own. State support of terrorism refers to all other delictual misconduct of the state not amounting to sponsorship. It is suggested that the state is responsible for acts of international terrorism that it supports along a sliding scale of state responsibility that takes into account the state's misconduct and the causative nexus between the state's misconduct and the harm.

A. State Sponsorship of Terrorism

The International Law Commission ("ILC"), a body established by the U.N. General Assembly to make recommendations for the codification of customary international law, describes when conduct is attributed to states in its Draft Articles on Responsibility of States for Internationally Wrongful Acts.[64] Articles 8 and 11 codify the relevant rules pertaining to state responsibility for terrorist acts committed by private persons. Article 8 is the classic formulation of the de facto agency principle; it reads: "[t]he conduct of a person or group of persons shall be considered an act of a State under international law if

63. The term "state terrorism" is probably a better label for acts of terrorism committed by public officials or organs of the state. Some states, of course, contend that state terrorism does not exist because by definition, terrorism is perpetrated only by private persons.

64. *ILC Report*, *supra* note 60, at 44-45.

the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[65] Historically, the ILC has firmly insisted that in order to meet this test "'*it has to be effectively proved*' [in each and every case] that the person or persons 'had really been charged by the state organs to carry out that specific act.'"[66]

Article 11, in contrast, does not require proof of a state's prior knowledge, and instruction or control of a terrorist act in order to attribute a private person's conduct to the state. Under this rule, "conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of a State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own."[67] This rule differs from the classic formulation of the de facto agency principle in that the private person is not acting on behalf of the state at the time of the act's commission, rather state responsibility is based on the state identifying the conduct and either expressly or impliedly making the conduct its own at some later date.[68]

In two different cases, the International Court of Justice ("ICJ") applied and expanded on the tests found in Articles 8 and 11 to determine whether a state was responsible for criminal and terrorist activities committed by private persons. In the first case, entitled *United States Diplomatic and Consular Staff in Tehran*, the ICJ held that Iran was responsible for the taking of U.S. hostages by private militants because the Iranian Government sanctioned and perpetuated the hostage crisis.[69] In November 1979, thousands of student militants overran the U.S. Embassy in Tehran and took about ninety people hostage in protest of the Shah's admission to the United States for cancer treatment after his escape from the Iranian Revolution. When the militants entered the Embassy compound, Iranian security forces responsible for guarding the building left without a fight.[70] The Iranian government refused to take action against the militants and "numerous Iranian authorities, including

65. *Id.* at 45.

66. Luigi Condorelli, *The Imputability to States of Acts of International Terrorism*, 19 ISRAEL Y.B. HUM. RTS. 233, 239 (1990).

67. *ILC Report*, *supra* note 60, at 45.

68. *Id.* at 122.

69. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, ¶ 74 (May 24).

70. *Id.* ¶ 57.

religious, judicial, executive, police, and broadcasting authorities" expressed approval of the hostage taking.[71] The Ayattolah Khomeini, the Muslim leader of Iran, publicly stated: "The noble Iranian nation will not give permission for the release of the rest of them. Therefore, the rest of them will be under arrest until the American Government acts according to the wish of the nation."[72]

The ICJ concluded that, although the militants initially acted on their own,[73] Iran's approval and perpetuation of the hostage crisis for more than a year transformed the acts of the private militants into acts of the state.[74] Under the ILC's draft articles, this decision is probably closer to the situation envisaged in Article 11 than Article 8, and may have even motivated the drafting of Article 11, added after the *Tehran* decision. The ICJ treated the Ayattolah's statement, in particular, as an acknowledgement and express adoption of the hostage taking. Unlike the classic Article 11 situation, however, the hostage crisis was not over when the Iranian state approved and adopted the actions of the private militants; instead, Iran continued the hostage crisis for a total of more than fourteen months under the authority of the state. In this respect, the *Tehran* case resembles an Article 8 situation, in which the state directed or controlled the militants, although it may be more accurate to say Iran declined to exercise control over the militants, a situation that does not fall within the express language of Article 8.

Six years later in *Military and Paramilitary Activities in and against Nicaragua*, the ICJ ruled that the United States was not responsible for the rebel activities of Nicaraguan Contras because evidence that the contras were controlled and dependent on the United States was insufficient to establish that the United States directed their each and every act.[75] The United States, in the midst of the Cold War, was concerned about communism spreading from Nicaragua, where the U.S.-backed dictator, Anastasio Somoza, was

71. *Id.* ¶ 71.

72. *Id.* ¶ 73.

73. "No suggestion has been made that the militants, when they executed their attack on the Embassy, had any form of official status as recognized 'agents' or organs of the Iranian State. Their conduct in mounting the attack, overrunning the Embassy and seizing its inmates as hostages cannot, therefore, be regarded as imputable to that State on that basis." *Id.* ¶ 58.

74. *Id.*

75. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 109 (June 27).

ousted in a popular revolution to El Salvador and other states in the region. Under the leadership of the Reagan Administration, the United States organized, trained, armed, and financed the contras, many of whom were former Somoza National Guards, in their opposition to the new communist government of Nicaragua.[76] The contras engaged in attacks against the Nicaraguan state and brutally murdered, raped, mutilated, and terrorized Nicaraguan civilians.[77] For years, the United States provided crucial support to the contras and the eruption of the Iran-Contra Scandal later revealed that the Central Intelligence Agency funded the contras by illegally selling weapons to Iran at inflated prices.

The ICJ ruled that U.S. support for the contras infringed on Nicaragua's territorial sovereignty in contravention of international law,[78] but concluded the evidence did not demonstrate the United States "actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf."[79] In order to attribute the actions of the contras to the United States, the ICJ required proof in each instance that operations launched by the contras "reflected strategy and tactics solely devised by the United States."[80]

Whereas the judgment in the *Tehran* case was met with general approval and approbation, the *Nicaragua* decision was criticized for its "painstaking examination" of specific acts.[81] The ICJ's act-by-act

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76. *Id.*

77. *Report Accuses Contras of Murder, Mutilations*, CHI. TRIB., Feb. 20, 1985, at 5, *available at* 1986 WL 2647862. Critics of the U.S. government charged the United States with supporting terrorism and deviating from its own State Department definition of terrorism when in its national interest. Despite reports of terrorism perpetrated by contra rebels, President Reagan was a staunch supporter of the contras and described them as freedom fighters, even likening them to the Founding Fathers of the United States. *See* George Skelton, *President Reiterates Firm Backing for Contras*, L.A. TIMES, Mar. 2, 1985, at 5, *available at* 1985 WL 2206644.

78. *See* Military and Paramilitary Activities, *supra* note 75, ¶ 108.

79. *Id.* ¶ 109.

80. *Id.*

81. "In several instances the Court in the Nicaragua case determined generally that there was insufficient evidence to prove a point. There was no 'direct evidence of the size and nature of mines' laid in the Nicaraguan ports. There was no evidence of U.S. involvement in the planning or execution of certain attacks on Nicaraguan installations.... Where the Court is proceeding by a relatively painstaking examination of what has, and what has not, been denied or proved, it can readily be seen that the lack of specificity common to many political and diplomatic statements will result in an inadequacy of proof or persuasion." Keith Highet, *Evidence, The Court, and the Nicaragua Case*, 81 AM. J. INT'L L. 1, 40-41 (1987); *see also* Francis V.

approach to de facto agency, also sketched out in Article 8, requires proof of state authorization of each and every act carried out by private persons before the conduct is attributed to the state. This approach risks mistaking the trees for the forest so as a result states can get away with sponsoring terrorists so long as they do not direct specific acts. Furthermore, it is often unduly difficult to collect evidence on state direction or control of terrorists, who are employed and work in circumstances of great secrecy and concealment. For these reasons, it seems inequitable to absolve the United States of responsibility for the crimes of contra rebels, especially given the ICJ's concession that U.S. support was crucial to their activities.[82]

An alternative rationale for the *Nicaragua* decision, largely overlooked in scholarly literature, but firmly rooted in the historically important debate over the criminality of terrorism, is an expansive reading of the right to self-determination and a permissive attitude toward revolutionary activities. It makes some logical sense to conclude the contra rebels, in fact, were not acting on behalf of the U.S. government, regardless of the extent of U.S. support, but rather fighting for their own liberation. Judge Ago, in his separate opinion, alluded to this argument when he stressed that the conflict in Nicaragua arose from the seeds of civil strife and internal unrest.[83] Unlike in the *Tehran* case, in which Iran allowed a hostage crisis to occur under its watch, the criminal acts of contra rebels took place in Nicaragua, far outside of U.S. territory.

This reasoning, however, wrongly presupposes the contras cannot act on behalf of multiple parties at the same time, especially where the interests of the contras and the U.S. government overlap. It also gives states carte blanche freedom to support any group involved in a struggle for self-determination and yet avoid responsibility for the actions of those groups. Ultimately, a legal system that respects sovereign borders and takes state sponsored terrorism seriously must take a hard stance against state support of terrorist tactics in revolutionary activities. Even more importantly, the international community must establish a test of de facto agency that balances faithfulness to legal principles of state responsibility and

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Boyle, *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT'L L. 86 (1987); Claire Finkelstein, *Changing Notions of State Agency in International Law: The Case of Paul Touvier*, 30 TEX. INT'L L.J. 261, 274-275 (1995).

82. *See* Military and Paramilitary Activities, *supra* note 75, ¶ 110.

83. *Id.* ¶ 10 (separate opinion of Judge Ago).

sensitivity to the unique evidentiary problems associated with demonstrating state control or direction of terrorist activities.

B. State Support of Terrorism

In the *Nicaragua* case, the ICJ adopted an all or nothing approach to state responsibility. In the absence of sufficient proof to demonstrate the contras were de facto agents of the U.S. government, the United States escaped any responsibility for the contras' actions. This approach created a simple measure of damages because only two bipolar options existed – either the United States was or was not responsible for the actions of the contras. The problem with this approach is its tendency to oversimplify and distort real life situations in an effort to classify conduct as either public or private. Professors Mark Gibney, Katarina Tomasevski, and Jens Vedsted-Hansen explain:

> The ICJ decision in *Nicaragua* is especially objectionable because the U.S. Government's actions in supporting the contras was ultimately treated under the law as being indistinguishable from countries that had absolutely no connection with the contras whatsoever (Kenya, say). But this 'either-or' approach to transnational state responsibility wildly misses much of what is actually taking place in the world.[84]

Although the principle of de facto agency enunciated in the *Nicaragua* decision is certainly an important and useful device in the law of state responsibility, the all or nothing approach that it engenders lacks the necessary flexibility in some contexts to distinguish between shades of state responsibility. The notion of state support of terrorism is intended to remedy this problem. It is used to describe all other state involvement in terrorist acts not amounting to sponsorship, which can be placed along a continuum "beginning with active involvement and descending to benign neglect."[85] Under this scheme, a state that supports terrorism, in dereliction of its international duties, may be held responsible in full or in part for the terrorist act along a sliding scale of state responsibility, which takes into account the egregiousness of the state's misconduct and the nexus between the state's conduct and the terrorist act.

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84. Mark Gibney et al., *Transnational State Responsibility for Violations of Human Rights*, 12 HARV. HUM. RTS. J. 267, 287 (1999).

85. Lillich, *supra* note 16, at 308; *see also* Kenneth W. Abbott, *Economic Sanctions and International Terrorism*, 20 VAND. J. TRANSNAT'L L. 289, 293 (1994).

This sliding scale of state responsibility is a more nuanced and sensible approach to state responsibility than the all or nothing approach inherent in the *Nicaragua* decision. A sliding scale of state responsibility ultimately requires a case-by-case analysis to determine the state's responsibility for terrorist acts supported by the state, but committed by private persons. It is possible, however, to identify several important variables that should be considered. State responsibility must first be founded on a violation of international law by the state. There is no per se or absolute theory of liability that makes states responsible for terrorist acts committed by private persons.[86] There are, however, three different situations in which state responsibility attaches: first, where a state actively supports international terrorism;[87] second, where a state breaches a duty to prevent international terrorism;[88] and third, where a state breaches a duty to prosecute or extradite those persons who committed acts of international terrorism.[89] As a general rule, a state that knowingly supports terrorists in bad faith is more culpable than a state that negligently, but inadvertently supports terrorism and a pattern or practice of supporting terrorism also calls for greater state responsibility. States are also expected to exercise a higher degree of due diligence in protecting diplomats and other persons with special international status.[90] The causative nexus between the state's conduct and the private act is also important. As a general proposition, states that support terrorism before or during the commission of the crime, as in the *Nicaragua* case by organizing, training, or arming terrorists, are more responsible for the criminal act than those states that support terrorists after the fact by providing asylum. Sometimes, however, a foreseeable consequence of providing asylum to terrorists is the commission of terrorist acts in the future for which they may be held responsible.[91]

State responsibility for terrorist activities actively supported by the state logically follows from the state's complicity in the offense.[92] More problematic is a state's responsibility for acts of terrorism that it failed to prevent. A state is not expected to prevent every act of

86. Lillich, *supra* note 16, at 225-226.
87. *Id.* at 236-237.
88. *Id.* at 230-231, 261.
89. *Id.* at 306.
90. OPPENHEIM, *supra* note 60, § 165a; Lillich, *supra* note 16, at 232.
91. *See* Lillich, *supra* note 16, at 285.
92. *Id.* at 236-237.

international terrorism that originates from within its territory.[93] What is expected is that states exercise due diligence in the performance of their international obligations so as to take all reasonable measures under the circumstances to protect the rights and securities of other states.[94] In the *Tehran* case, the ICJ explained that due diligence is breached when the state was "aware of the need for action on their part" and "failed to use the means which were at their disposal" to prevent the harm.[95]

The ICJ employed this same two-part test of due diligence in the *Corfu Channel* case.[96] In this case, the United Kingdom brought suit against Albania for damage sustained to two British warships by mines moored in Albanian territorial waters.[97] In upholding the British claim, the ICJ decided Albania's failure to warn the British ships of imminent danger was a breach of international law.[98] Although the ICJ stated proof of a state's awareness of a threat cannot be presumed and must "leave no room for reasonable doubt,"[99] it concluded the mines could not have been laid "without the knowledge [or connivance] of the Albanian Government."[100] In framing the breach as a failure to warn, rather than a failure to remove the mines, the ICJ chose to focus on that conduct which was most easily within the power of the Albanian Government.

The *Tehran* case and *Corfu Channel* case demonstrate that due diligence, or what conduct is reasonably expected of states in order to protect the rights of other states, is defined as a function of the state's knowledge about a threat and its power to prevent the harm. "The most difficult aspect of applying traditional state responsibility norms to terrorist situations is that the latter rarely conform to the neat prior-notice pattern. Surprise attacks are endemic to terrorism."[101]

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93. OPPENHEIM, *supra* note 21, § 156.

94. Lillich, *supra* note 16, at 245-246; Jeffrey Allan McCredie, Note, *The Responsibility of States for Private Acts of International Terrorism*, 1 TEMP. INT'L & COMP. L.J. 69, 86 (1985). At a minimum, the duty of due diligence demands that states act in good faith and non-negligently in the performance of their international obligations. OPPENHEIM, *supra* note 93, § 156.

95. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), *supra* note 69, ¶ 68.

96. Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).

97. *Id.* at 12.

98. *Id.* at 22-23.

99. *Id.* at 18.

100. *Id.* at 22.

101. Lillich, *supra* note 16, at 249.

For this reason, constructive knowledge, such as when a number of terrorist acts have occurred in the past in the same area, may be a desirable surrogate for actual knowledge in the terrorism context.[102]

In addition to customary norms of international law that require states to refrain from actively supporting terrorism and require states to exercise due diligence to prevent acts of international terrorism, in certain situations, state responsibility for terrorist activities may also be predicated on a denial of justice for the state's failure to prosecute or extradite terrorists in good faith. Although customary international law does not require the prosecution or extradition of international terrorists in all circumstances, states are expected to prosecute terrorists who commit crimes against aliens within the territory of that state.[103] This duty to prosecute requires that states afford aliens with the same access to the domestic judicial system as enjoyed by its citizens for crimes that occur within its jurisdiction.[104] A state fulfills its duty to prosecute when it in good faith attempts to apprehend, prosecute, and adequately punish the terrorists.[105] The state is not expected to suspend its internal laws in order to ensure that terrorists are brought to justice.[106] Constitutional and statutory safeguards that limit the municipal power of the state, such as those regulating searches and seizures, self-incrimination, and the state's burden of proof, may frustrate the goals of international law, but do not violate its substance.

In *Janes v. United Mexican States*, the majority and dissent of the General Claims Commission grappled with the notion of a sliding scale of state responsibility and the proper conditions in which to attribute private conduct to the state for a denial of justice. In *Janes*, a Mexican miner murdered a U.S. citizen working in Mexico as a mine superintendent.[107] Although several eye-witnesses to the crime

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102. *Id.* at 246.

103. *Id.* at 305-306; OPPENHEIM, *supra* note 21, § 165.

104. *See* BRIERLY, *supra* note 53, at 286.

105. *Id.* at 287. Most Latin-American states contend that a court only needs to hear a case in order to fulfill its duty to prosecute. The prevailing rule, however, is that "[t]here are many possible ways in which a court may fall below the standard fairly to be demanded of a civilized state without literally closing its doors. Such acts cannot be exhaustively enumerated, but corruption, threats, unwarrantable delay, flagrant abuse of judicial procedures, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it, are instances." *Id.* at 286-287.

106. *Id.* at 287.

107. Janes v. United Mexican States (U.S. v. Mex.), 4 R.I.A.A. 82, ¶¶ 17, 19

identified the murderer to Mexican authorities, the police did almost nothing to investigate or apprehend the suspect as required by international law.[108]

The majority concluded that attribution of the murder to Mexico was inappropriate because Mexico was not responsible for the murder itself, only its failure to punish the culprit after the fact.[109] In other words, the state was not responsible for the crime because the state, which was not accused of inciting or otherwise assisting the murderer before or during the criminal act, played no causative role in the murder. The majority stated: "[e]ven if the non-punishment were conceived as some kind of approval—which in the Commission's view is doubtful—still approving of a crime has never been deemed identical with being an accomplice to that crime. . . ."[110] The ILC also takes this position in its commentary to Article 11; it explains that a state's verbal approval or endorsement of a crime "in some general sense" does not make the state responsible for the crime.[111]

Nonetheless, the ILC does make an exception when the state acknowledged and adopted the act, even though there is no causative nexus between the state's conduct and the criminal act.[112] The dissent invoked this rule, codified in Article 11 of the ILC's draft articles, when he wrote the responsibility to "compensate the claimant for the injuries flowing from the wrongful act of the individual . . . rests upon the offending State because by its failure to act it condones and ratifies the wrongful act, thereby making the act its own."[113] The majority conceded that there was a basis in international law to attribute an unpunished criminal act to a state for its failure to prosecute:

> At times international awards have held that, if a State shows serious lack of diligence in apprehending and/or punishing culprits, its liability is a derivative liability, assuming the character of some kind of complicity with the perpetrator himself and rendering the State responsible for the very consequences of the individual's

(1925).

108. *Id.*

109. *Id.* ¶ 22.

110. *Id.* ¶ 20.

111. *ILC Report*, *supra* note 60, at 121.

112. *Id.* at 45.

113. Janes, *supra* note 107, at 90 (Commissioner Nielson in separate statement regarding damages).

misdemeanor.[114]

The fundamental disagreement between the majority and dissent, therefore, appears to lie in whether the facts of the case supported the inference that Mexico acknowledged and adopted the murder as its own. Although Mexico did not expressly adopt the murder as in the *Tehran* case, the dissent apparently implied an adoption from the Mexican police's failure to take simple steps to arrest and try the suspect.[115] The dissent may have also taken judicial notice of the social conditions in Mexico at the time, which led police to be antagonistic toward U.S. citizens perceived as exploiting Mexican labor. The majority, in contrast, did not infer an adoption of the murder from Mexico's failure to prosecute; and at least according to the ILC's commentary to Article 11, which distinguishes "mere support" from adoption, the majority has the stronger argument.[116] Although there was a failure to prosecute, there was no evidence the Mexican police or any other governmental agencies ever treated the murder as an act of the state, since the state did not publicly honor the murderer or confer him with governmental authority.

If the majority's analysis is correct and the *Janes* Case was not an Article 11 situation, then Mexico's conduct was more analogous to state support than sponsorship. The majority went on to describe how it assessed Mexico's responsibility for its failure to prosecute:

> As to the measure of such a damage caused by the delinquency of a Government, the nonpunishment [sic], it may be readily granted that its computation is more difficult and uncertain than that of the damage caused by the killing itself. . . . Not only the individual grief of the claimants should be taken into account, but a reasonable and substantial redress should be made for the mistrust and lack of safety, resulting from the Government's attitude.[117]

The majority awarded $12,000US to the United States on behalf of the claimants;[118] and in so doing, claimed not to hold Mexico responsible for the actual murder. Nonetheless, the majority did not explain why Mexico was responsible for the "individual grief of the claimants" if the state was not responsible for the murder, which was surely the predominant cause of the grief suffered by the victim's

114. *Id.* ¶ 19.
115. *See id.* ¶ 3.
116. *ILC Report*, *supra* note 60, at 121.
117. Janes, *supra* note 107, at 98, ¶ 25.
118. *Id.* ¶ 27.

family. Moreover, the claimants never alleged any damages based on "mistrust" or "lack of safety."[119] Given the intangible and speculative nature of damages for a failure to prosecute,[120] and courts' greater familiarity and experience with the assignment of damages for wrongful death, it is unlikely the murder itself did not influence or anchor the majority's decision-making.

Despite the vociferous disagreement between the majority and dissent over the proper measure of Mexico's responsibility, both ultimately agreed on the exact dollar amount that Mexico owed to the claimants.[121] One explanation for the majority and dissent's agreement on the damage award of $12,000US is that the entire Commission shared a common understanding of Mexico's grossly negligent conduct and callous indifference for the murder of a U.S. citizen on Mexican soil. The majority exhibited its preference for a sliding scale of state responsibility when it stated:

> One among the advantages of severing the Government's derelection [sic] of duty from the individual's crime is in that it grants an opportunity to take into account several shades of denial of justice, more serious ones and lighter ones (no prosecution at all; prosecution and release; prosecution and light punishment; prosecution, punishment and pardon); whereas the old system operates automatically and allows for the numerous forms of such a denial one amount only, that of full and total reparation.[122]

Thus, the majority thought that it was preferable to adopt a rule that does not automatically attribute a private person's criminal act to the state for a failure to prosecute because it allows courts to fashion remedies on a case-by-case basis according to the egregiousness of the state's conduct, rather than simply holding a state responsible for a wrong committed by a private person every time the state fails to live up to its international duties. Of course, it could be asserted the *Janes* case uses the same all or nothing approach used in the *Nicaragua* case, in which state responsibility is based wholly and exclusively on the state's misconduct, which may itself vary along a sliding scale but in which the state escapes all responsibility for the private crime. This argument, however, makes a distinction without a difference because

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119. 1 MARJORIE WHITEMAN, DAMAGES IN INTERNATIONAL LAW 44-45 (1937).

120. *Id.*

121. Janes, *supra* note 107, at 98, ¶ 27 (Commissioner Nielson in separate statement regarding damages).

122. *Id.* ¶ 25.

the effect is the same—the state is held responsible in damages somewhere along a sliding scale. Moreover, the state's misconduct cannot be understood in isolation; it is inextricably connected to the private act.

Unfortunately, the rule of the *Janes* case, which holds states responsible for a denial of justice, is of limited value in the international terrorism context. While states are obligated to prosecute terrorist activities that occur within its territory against aliens, there is no corresponding duty under customary international law to prosecute terrorists who commit acts of terrorism in another state's territory.[123] The customary right of asylum permits states to harbor terrorists who attack the territory of another state, including al Qaeda terrorists hiding out in Afghanistan.[124] Moreover, even where an extradition treaty exists that requires states to prosecute or extradite persons who unlawfully harm the territory of another state, the political offense exception significantly erodes the duty to prosecute.[125] Although this exception originally came into existence to protect persons from discriminatory persecution, it is an expansive right that permits states to refuse prosecution or extradition of any person that it determines is charged with a political offense.[126] As a result, this exception is well suited to justify the granting of asylum to international terrorists acting out of political motives, especially those involved in a national liberation movement.[127]

In November 2001, however, the Security Council took a position that indicates the right of asylum may no longer be applicable to terrorist attacks. It stated that "all States shall deny safe haven to those who finance, plan, support, or commit terrorist acts. . . ."[128] On its face, this rule does not distinguish between terrorist activities based on the location of the crime. However, the Council's authority to proscribe the practice of granting asylum to terrorists is questionable and untested. This resolution represents the Council's first attempt to use its powers under the U.N. Charter to

123. Lillich, *supra* note 16, at 298.

124. *Id.*

125. *See* JOHN F. MURPHY, THE AMERICAN SOCIETY OF INTERNATIONAL LAW, LEGAL ASPECTS OF INTERNATIONAL TERRORISM: SUMMARY REPORT OF AN INTERNATIONAL CONFERENCE 2 (1980).

126. JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW 258-260 (1996).

127. *See* OPPENHEIM, *supra* note 60, § 334; Lillich, *supra* note 16, at 300.

128. U.N. SCOR, 56th Sess., 4385th mtg. at 2, U.N. Doc. S/RES.1373 (2001); *see also* U.N. SCOR, 56th Sess., 4413th mtg. at 2, U.N. Doc. S/RES.1377 (2001).

create binding international law based on a generic threat to international peace and security, a far cry from its other resolutions, which are limited to regulation of specific inter-state conflicts.[129] Nonetheless, the Council is acting in accordance with a long legacy of antiterrorism conventions, which require that states either themselves prosecute, or in the alternative, extradite international terrorists within their territory.[130]

In fact, some scholars posit that for certain narrowly defined crimes set out in the most widely accepted antiterrorism conventions, such as aircraft hijacking and crimes against internationally protected persons, customary international law imposes a duty to prosecute or extradite terrorists regardless of where the crime occurred.[131] They argue that these antiterrorism conventions reflect norms of state behavior and thus, the duty to prosecute or extradite included in these conventions is also a reflection of customary international law.[132] More likely, however, is that these conventions represent customary norms of international law only to the extent that they define the crime of terrorism. Professor Lillich expressed his view, prior to the recent Security Council resolution, that "it is doubtful whether a state incurs liability – at least in the absence of its being a party to an applicable convention – if it merely offers safe-haven to terrorists who have committed their acts in another state."[133]

One of the most important and beneficial developments in international law that may arise out of September 11 is a deterioration of the right of asylum. The harboring of terrorists is no less detrimental to world peace and security than the incitement or toleration of terrorist activities, despite its happening after the commission of the crime. Many terrorists depend on the promise of a safe harbor, from which they may freely live and even plan future terrorist attacks. Viewed as another form of state support, the practice of granting asylum to terrorists should be treated as a violation of international law.

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129. Jim Wurst, *U.N. Debates Definition of Terrorism*, INTER PRESS SERV., Oct. 4, 2001, *available at* 2001 WL 4805541.

130. Murphy, *supra* note 9, at 18-19.

131. *See* MURPHY, *supra* note 125, at 26-27.

132. *Id.*

133. *Id.*

Conclusion

Decades from now, historians and scholars will be in a position to document how September 11 changed the way states think about terrorism, its definition, and the responsibility of states in managing their own territory for the collective security. In the wake of September 11, the Security Council has taken steps toward an unqualified condemnation of terrorism irrespective of cause or motivation and has condemned the general state practice of granting asylum to international terrorists.

This note suggests that states should use the international legal system to hold states accountable in damages for state sponsorship and support of terrorist activities committed by private persons. The bringing of claims through diplomatic channels and before judicial tribunals educated in international law will not only increase state accountability for international terrorism, but will also create a much needed opportunity to change and clarify international norms relating to terrorism and state responsibility. Customary norms of international law should evolve in response to the changing needs of the international community. As the threat of international terrorism increases, states may wish to impose criminal sanctions on states for the use of terrorism, create enhanced duties of due diligence for the prevention and punishment of terrorism, and relax evidentiary standards for attributing terrorist acts to the state. There is certainly an urgent need in the international community to hold states responsible for the violation of international law and accountable for their participation in terrorist activities.

In furtherance of this objective, and in order to demonstrate the utility of legal analysis of state involvement in international terrorism, the Taliban regime's responsibility for the September 11 terrorist attacks is assessed in this conclusion. In October 2001, the British Government released a dossier of evidence summarizing intelligence that linked the September 11 attacks to bin Laden, his Afghanistan-based al Qaeda network, and the Taliban regime.[134] This evidence is examined here in order to determine if the law of state responsibility supports an inference that the Taliban regime was responsible for the September 11 al Qaeda terrorist attacks on the United States.

Based on the British dossier, any claim that the Taliban

134. Christine Middap, *Dossier Presents Case on Bin Laden*, HERALD SUN (MELBOURNE), Oct. 5, 2001, at 32.

sponsored the attacks is attenuated at best. There is little indication that either of the two tests set out in Articles 8 and 11 of the ILC's draft articles on state responsibility are met. The evidence does not suggest the Taliban controlled al Qaeda or directed its activities; nor is there proof of the Taliban providing arms, money, or other material support to al Qaeda.[135] Given these facts, this case is probably weaker than the case for U.S. control over Nicaraguan contras, who were organized, trained, armed, and financed by the U.S. government, although al Qaeda did use Afghanistan as a base for operations. Moreover, the Taliban never acknowledged and adopted the terrorist acts as its own as in the *Tehran* case; and under *Janes*, tacit approval of the attacks does not amount to adoption.

A much stronger case can be made that the Taliban are responsible for the attacks, somewhere along a sliding scale of state responsibility, based on its support of al Qaeda. The Taliban provided bin Laden and his al Qaeda network with a sanctuary in Afghanistan where terrorist attacks were planned without state intervention.[136] On this basis, if the Taliban knew about a terrorist threat to the United States and possessed power to prevent the harm, then the Taliban's failure to take action against the al Qaeda network was a breach of its international duties. However, the *Corfu Channel* case seems to require actual knowledge of a specific threat in order to hold the state responsible for the harm. There is no evidence the Taliban possessed actual knowledge of the September 11 attacks in advance;[137] however such a narrow construction of the knowledge requirement in this situation would seem to pervert the objectives of international law. The Taliban knew bin Laden and al Qaeda planned and trained for terrorist activities in Afghanistan[138] and its lack of actual knowledge about the September 11 attacks could be attributed to its own negligent policing. Moreover, the Taliban never claimed it was unable to police terrorist activities and even declined an offer of assistance from the U.S. government prior to September 11 to help rid Afghanistan of terrorists.[139] For these reasons, there is a

135. *See id.*

136. *Id.*

137. *See id.*

138. Since 1993, al Qaeda has claimed credit for numerous attacks, including the murder of more than 260 people in Somalia, Kenya, Tanzania, and aboard the U.S.S. Cole. Moreover, "[i]n June 2001 . . . the U.S. warned the Taliban it would hold the regime responsible for attacks against U.S. citizens by terrorists in Afghanistan." *Id.*

139. *Id.*

reasonably strong basis in international law to conclude the Taliban failed to exercise due diligence to prevent acts of international terrorism.

In contrast, the Taliban regime's refusal to prosecute or extradite bin Laden and his cooperatives was probably consistent with international law. Although the refusal to extradite the masterminds behind the worst terrorist attack in history is the most damning evidence of the Taliban's bad faith and tacit approval of the attacks, according to customary norms of international law, the Taliban was probably permitted to grant asylum to terrorists who harmed aliens in another state. An argument can certainly be made that there is an emerging norm that requires the prosecution or extradition of all international terrorists. Even if this rule is retroactively adopted, however, the United States Government did not follow customary extradition procedures.[140] It never formally requested the extradition of bin Laden or any other suspect and never provided criminal evidence of a suspect's guilt to Afghanistan.[141]

Taliban support of al Qaeda was certainly egregious and in violation of customary norms of international law. Its history of state tolerance of, and acquiescence in, international terrorism enabled the al Qaeda network to commit terrible terrorist acts that are clearly proscribed by international law. Admittedly, Taliban support for al Qaeda was primarily passive, but its misconduct was knowing and grossly negligent. Its refusal to extradite, although probably legal, demonstrated extreme bad faith and was evidence of the state's seal-of-approval, even though it probably does not amount to an adoption. Based on these facts, principles of state responsibility support the inference that the Taliban was responsible in substantial part for the September 11 attacks.[142] In this manner, the application of the law of state responsibility to terrorist activities may prove to be one effective weapon among many in combating state sponsorship and support of

140. On September 20, in a televised address to a joint session of the U.S. Congress, President Bush demanded that the Taliban extradite Osama bin Laden and his cooperatives to the United States for trial. He stated that "[t]he Taliban must act, and act immediately. They will hand over the terrorists, or they will share their fate." *See* President Bush, *supra* note 5.

141. M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT'L L.J. 83, 87 (2002).

142. For another article that reaches a similar conclusion regarding Taliban responsibility for the September 11 attacks, *see* Robert K. Goldman, *Certain Legal Questions and Issues Raised by the September 11 Attacks*, 9 HUM. RTS. BR. 2, 3 (2001).

international terrorism.